DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 27782]

RIN 2120–AF90

Proposed Policy Regarding Airport Rates and Charges

AGENCY: Department of Transportation (DOT), Federal Aviation Administration (FAA).

ACTION: Supplemental notice of proposed policy; reopening of comment period.

SUMMARY: This document proposes a significant revision of the Policy Regarding Airport Rates and Charges published with request for comment on February 3, 1995. The proposed policy retains the structure and basic approach of the February 3 policy statement, but the strict requirement for equality of fees and costs based on historic cost valuation of assets would be limited to the airfield portion of an airport, and the policy would permit substantial flexibility in the establishment of fees for other aeronautical facilities. The revision reflects public comments received on the February 3 policy statement. This notice announces two public meetings on the proposed policy and reopens the comment period until October 23, 1995.

DATES: Comments must be received by October 23, 1995.

ADDRESSES: Comments should be mailed, in quadruplicate, to: Federal Aviation Administration, Office of Chief Counsel, Attention: Rules Docket (AGC–10), Dockets No. 27782, 800 Independence Avenue SW., Washington, DC 20591. All comments must be marked: ''Docket No. 27782.'' Commenters wishing the FAA to acknowledge receipt of their comments must include a preaddressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 27782.'' The postcard will be date stamped and mailed to the commenter.

Comments on this Notice may be examined in room 915G on weekdays, except on Federal holidays, between 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: John Rodgers, Director, Office of Aviation Policy, Plans and Management Analysis, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591, telephone (202) 267–3274; Barry Molar, Manager, Airports Law Branch, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, telephone (202) 267–3473.

SUPPLEMENTARY INFORMATION: Section 113 of the FAA Authorization Act of 1994, Public Law 103–305 (1994 Authorization Act) signed into law on August 23, 1994, 49 U.S.C. 47129, required the Secretary of Transportation to issue standards or guidelines for use in determining the reasonableness of an airport fee. After notice and opportunity for public comment, on January 30, 1995, the Office of the Secretary of Transportation (OST) and the FAA issued a ''Policy Regarding Airport Rates and Charges,'' and requested further public comment on the interim policy as published. Docket No. 27782 (60 FR 6906, February 3, 1995). The comment period on the interim policy closed on May 4.

Comments Received

More than 125 comments were received in response to the February 3 request for comment, including comments received after the close of the comment period. The Department considered all comments, including the late-filed comments. Because the Department is proposing a substantially revised policy statement and publishing the statement for an additional comment period, the Department will include in this supplemental notice only a brief discussion of public comments received on the February 3 policy statement, and will not address the comments in detail at this time. When a final policy statement is published in the **Federal Register**, the Department will include a comprehensive response to public comments received on both the February 3 interim policy and this proposed revision.

Summary of Proposed Changes and Response to Significant Issues Raised

1. Valuation of Assets for Ratesetting Purposes.

The interim policy requires valuation of all airport land and airfield assets at historic cost to the original airport proprietor (Para. 2.4.1). The airport proprietor may use other valuation methods for other assets, but total aeronautical revenue may not exceed total aeronautical cost, based on historic cost asset (HCA) valuation, absent agreement (Para 2.4.1(a)).

Aeronautical users filing comments supported the interim final policy's approach to asset valuation.

Airport operators uniformly criticized the treatment of asset valuation. They argued that, *inter alia,* the combination of the HCA valuation requirement and the total cost cap will disrupt their current practices in leasing nonairfield facilities; will underfinance smaller airports that are unable to use debt-financing to fund capital replacement and improvement; and will cause signatory carriers to pay more than non-signatory carriers under certain residual lease and use agreements. They also argued that the HCA requirement is inconsistent with § 47129's prohibition on setting rates; is inconsistent with Departmental policies on financial self-sustainability of airports; and is inconsistent with an airport proprietor's Constitutional right to earn a reasonable return on investment.

While airport commenters prefer elimination of the HCA valuation requirement for all assets, most (the City of Los Angeles being the primary exception) stated that retention of the HCA valuation requirement for the airfield would be acceptable, because HCA valuation for the airfield reflects common industry practice.

The Department proposes to revise the policy by limiting the HCA valuation requirement in proposed Para. 2.5.1 to airfield assets and by eliminating the total HCA cost cap for aeronautical facilities (Para. 2.4.1(a) of the interim policy). Airfield assets would be defined in the applicability section of the policy statement to include runways, taxiways, nonexclusively leased aprons, land associated with these facilities, and land acquired and held to assure compatibility with airfield operations. If the latter land were developed for compatible, nonairfield uses, the land would be removed from the airfield rate base.

In addition, further guidance would be given on the way airfield land may be included in the rate base (proposed Para. 2.5.1(a)). The cost of land acquired with debt could be included in the rate base by charging all debt service expenditures to the airfield cost center. The cost of land acquired with internally generated funds or donated by the airport proprietor could be recovered by amortization. A new paragraph 2.5.1(b) is proposed to clarify that, while HCA valuation must be used to establish total airfield costs, airport operators may, to enhance the efficient use of the airfield, allocate costs using a reasonable and not unjustly discriminatory methodology that departs from a pro rata division of HCA costs.

A new paragraph 2.6 would be added, providing that fees for other aeronautical services and facilities could be established by any reasonable methodology. As discussed below, the policy would provide for FAA scrutiny

of accumulation of surplus funds attributable to aeronautical revenues, however. The Department does not intend this possible scrutiny to function as an indirect reinstatement of the HCA cost cap.

The proposed revision to the policy is intended to carry out the Department's mandate to adopt a policy that assures that airport fees are reasonable while avoiding unnecessary disruption to long-standing, well-accepted pricing practices, especially for nonairfield assets.

For nonairfield facilities, which may be priced according to any reasonable method, our experience suggests that effective competition generally exists. Fees for such facilities are generally established by agreement between the airport proprietor and aeronautical user based on negotiations. Formal administrative complaints over fees for nonairfield facilities have in almost all instances involved allegations of unjust discrimination—not allegations that nonairfield fees were excessive. Moreover, since 1989, all of those complaints not still pending have been dismissed following investigation. Based on these considerations, we propose to rely on the discipline of competition, in the first instance, rather than detailed prescriptions of permissible charging practices to assure that fees for nonairfield facilities meet the requirements of reasonableness contained in statutes, grant agreements and applicable international aviation agreements. However, the policy would explicitly preserve the authority of the FAA to investigate the accumulation of aeronautical surpluses.

For airfield assets—runways and taxiways—there is greater risk that airport proprietors may enjoy locational monopoly power. The HCA requirement for these assets would guard against any abuse of monopoly power and would conform to general industry practice.

The HCA valuation requirement does not conflict with the statutory prohibition on setting the airport fee. The valuation of airfield assets is but one element in setting a fee. Even with the HCA valuation requirement, the airport proprietor has substantial latitude with respect to those other elements.

Further, the HCA valuation requirement does not amount to a regulatory taking of property. The HCA valuation requirement allows the airport proprietor to fully recover its costs of providing airfield facilities. HCA valuation is one of the methods that has been found reasonable, and hence constitutional, by the courts.

Finally, many of the arguments against the HCA requirement for the airfield were considered and rejected by the Department in its decision on the Los Angeles International Airport (LAX) landing fee dispute. See pages 19–26, Order 95–6–36 (June 30, 1995).

2. Applicability to Airfield and Non-Airfield Assets

As noted above, the Department proposes to modify the interim policy to eliminate the total HCA cap on aeronautical revenues and to permit nonairfield fees to be set according to any reasonable method. In keeping with this change, the provision in the policy requiring that aeronautical revenues not exceed aeronautical costs (Para. 2.1 of the interim policy) would be narrowed to apply to airfield revenues and costs (Proposed para. 2.2). Similarly, the provision specifying in detail the costs that may be included in the rate base (Proposed Para. 2.4) would be modified by adding an exception for nonaeronautical fees determined by other reasonable means as provided in proposed Para. 2.6. The Department relies on market forces in the leasing of nonairfield facilities to assure that aeronautical revenues, averaged over time, will approximate costs, including the airport's capital investment needs. However, it is unrealistic to expect the market to produce fees that exactly equal costs for each particular user during every accounting period.

3. Charging Imputed Interest on Investment of Surplus Aeronautical Revenues

The interim policy provides that airport proprietors could include in the aeronautical rate base the implicit cost of capital (imputed interest) of funds generated from nonaeronautical sources and invested in capital assets for aeronautical use (par. 2.3.1). The interim policy further provides that the Department considers it reasonable to use the rate of interest prevailing at the time of the expenditure on bonds issued by the airport proprietor or another airport with a similar bond rating.

Airport commenters objected to this provision on a number of grounds. They argued that by precluding interest on surpluses generated from aeronautical revenues, the policy creates an incentive to invest such aeronautical surpluses in nonaeronautical assets. They further argued that it will be difficult, if not impossible, in most cases to trace a surplus to nonaeronautical sources. In addition, they argue that an interest rate based on their borrowing costs is unreasonably low, and that a reasonable rate of interest should be based on what the airport proprietor could earn on alternative investments.

Airport users did not object to this provision.

After reviewing the comments and in light of the other revisions to the policy relating to fees for nonairfield services and facilities, the Department proposes to modify the provision on imputed interest. The new provision would permit the airport proprietor to include in the rate base imputed interest on all funds invested in aeronautical facilities except those generated from airfield operations and funds acquired through issuance of debt when debt service costs are also included in the rate base. In addition, the policy would no longer specify a particular interest rate as reasonable. This approach is consistent with our decision to provide greater flexibility in establishing nonairfield fees. As promulgated, the interim policy could be read as limiting the assessment of an imputed interest charge on nonairfield assets such as terminals and hangars. With the additional flexibility proposed in this supplemental notice for nonairfield fees, it is possible that fees could include an element of imputed interest that would be inconsistent with the interim policy's limitation on imputed interest. By narrowing the scope of the provision on imputed interest (Proposed Para. 2.4.1) to funds generated by the airfield, the Department would avoid a potential internal conflict in the policy. In addition, the new approach would reduce the potential disincentives to investing funds in aeronautical, rather than nonaeronautical assets.

Under the revised proposal, the airport proprietor could not charge imputed interest on funds generated from fees charged for the use of the airfield. The policy and legal considerations for this limitation are discussed below, in connection with the issue of allowing a return on investment.

With respect to commenters' concerns over the ability to trace the source of funds, we note that in the recent decision on LAX landing fees, the Department stated that, under the Administrative Procedure Act, a carrier complaining about inclusion of imputed interest in the rate base would bear the burden of proving that the airport proprietor was claiming imputed interest on aeronautical surpluses. Under this ruling, an airport proprietor need not trace the source of internally generated funds to claim imputed interest. However, if the airport proprietor has data available that would enable a complainant to trace the funds, that data should be disclosed during fee

negotiations or in connection with a fee dispute resolution proceeding.

4. Return on Investment.

The interim policy does not provide for the inclusion of a separate return on investment in the aeronautical rate base.

Airport commenters generally objected to this omission. They argued that a return on investment represents the cost of providing capital for the airport and retaining that investment in use as an airport. They further argued that the failure to allow a rate of return would amount to an unconstitutional taking of property. In addition, they argued that by not allowing a rate of return in the aeronautical rate base, the policy provides incentives for airports to invest internally generated funds in nonaeronautical assets. They also argued that a rate of return is necessary to assure that airport proprietors have adequate revenue to meet debt service coverage obligations and maintain adequate cash reserves to protect against contingencies and unexpected declines in activity and revenue.

Airport users do not object to the approach of the interim policy statement on this issue.

The proposed revisions would permit airport proprietors to use any reasonable, not unjustly discriminatory method to establish nonairfield fees. Fees established by negotiation, for example, may well include a reasonable profit margin for the airport proprietor.

With respect to a publicly-owned airfield, no separate rate of return would be allowed, although imputed interest might be included in the rate base in some circumstances. This treatment of the airfield is justified by the nature of the airfield asset and by the Federal government's historic role and interest in airport development.

A publicly-owned airfield is a public asset operated for the benefit of the general public. Moreover, since the enactment of the first Federal airport aid program in 1946, the overwhelming preponderance of Federal assistance has been applied to finance airfield development. The purpose of this assistance has been to promote and assure the growth, safety and efficiency of the national air transportation system, not to assist airport sponsors in developing profit-making facilities. In this regard, we note that the AAIA specifically prohibits an airport proprietor from including the Federal share of projects in the airport's rate base. The Department considers this prohibition to reflect a Congressional intent to limit the public airport proprietor's ability to employ facilities financed in part with Federal assistance as a means to generate a profit. Finally, with the exception of Los Angeles, whose landing fees were found to be unreasonable in part, we are not aware of any public airport operator that has sought to include a rate of return in its airfield rate base.

In contrast, nonairfield assets such as hangars and terminal gates, are usually leased on an exclusive-use basis. The lease rates reflect the value to the tenant of having an exclusive right to use the particular facility leased. In addition, hangars are ineligible for Federal funding. Eligible terminal development is limited to public use, nonrevenue producing areas—not those which would typically be the subject of an exclusive, or even preferential use lease. In addition, terminal development has constituted a relatively small share of overall Federal airport assistance over the years. Thus, for nonairfield aeronautical facilities, the possibility of earning a profit from Federally financed assets is a *de minimis* concern.

Finally, under the proposed policy, a public airport proprietor may recover its full costs, including the cost of its actual investment in the airfield. In addition, the policy allows the airport proprietor to add the cost of meeting debt-service coverage requirements and reasonable reserves to the rate base. Therefore, a separate rate of return allowance is not needed to meet these requirements for publicly owned airports. A private owner could earn a reasonable return on investment.

5. Applicability to General Aviation Airports

Airport commenters generally objected to the application of the policy to general aviation airports. They argued that § 47129 precludes the Department from adopting airport fee policies applicable to general aviation airports, since that section directs the Secretary to establish policies to be applied in disputes between air carriers and airports. They also argued that the total HCA cap would pose a hardship for most general aviation airports, where nonaeronautical revenues are insignificant and cannot be relied on to generate surplus funds to finance replacement and improvement of airport assets.

Airport users did not specifically address this issue.

The Department does not propose to exclude general aviation airports from the scope of the policy. However, we propose to modify the policy statement to clarify that in situations not covered by § 47129, the policy would be applied by the FAA in its role as administrator of the AIP program, under which the agency must satisfy itself that an applicant for grants is in compliance with its assurances, but does not provide a forum for adjudicating disputes between private parties.

While § 47129 mandates the promulgation of standards relating to airport fees charged to air carriers, it does not prohibit the development of airport fee policies for other airports. Section 511 of the AAIAct, 49 U.S.C. 47107(a) requires the Department to receive satisfactory assurances that, *inter alia,* each airport receiving a grant will be available for public use on reasonable terms without unjust discrimination. This provision is not limited to air carrier airports. Moreover, § 519(a) of the AAIAct, 49 U.S.C. 47122 authorizes the Department to take action we ''consider necessary to carry out'' the AAIA. Under these provisions, the Department has authority to issue a policy on reasonable and nondiscriminatory airport fees applicable to general aviation airports.

The Department is aware of the differences between general aviation airports and airports receiving extensive air carrier services. As we noted in publishing the interim policy, we will take these differences into account in applying the policy. Moreover, the potential adverse impact on general aviation airports of the revenue cap would be eliminated by our proposal to eliminate that cap.

6. Applicability Where an Agreement Exists

Airport commenters generally requested that we modify the policy to exclude fees established by agreements with users. They argued that the limitations in § 47129 (e)(1) and (f)(1) preclude the application of the policy to fees established by agreement. They also argued that fees established by agreement generally represent a mutual exchange of benefits to both parties. A determination of unreasonableness by the Department would disturb this exchange and provide a windfall to the airport user who challenged the fee.

The Department does not intend to fully exclude fees set by agreement from the scope of the policy. However, we propose to modify the policy statement to clarify that if the FAA reviews a fee set by agreement, the FAA will not act as a forum for adjudication of contract disputes between private parties.

As noted above, the AAIA provides authority for establishing a policy that applies to all airport fees imposed on aeronautical users, including fees established by agreement. In addition, many bilateral aviation agreements include a commitment by the United

States that airport fees charged to foreign airlines will be reasonable. An airport and individual aeronautical user or users cannot by private agreement waive the obligations of the AIP grant assurances, which are designed to protect the public, not just private interests. Similarly, they cannot waive the United States' obligations to foreign governments. Moreover, it is possible that an agreement that is reasonable, and even beneficial in its impact on the parties could have an unreasonable or unjustly discriminatory impact on nonparty airport users.

7. Applicability to Users Other Than U.S. Air Carriers

Airport commenters generally request us to limit the applicability of the policy to U.S. air carriers and foreign air carriers. A few commenters also request that we exclude fees charged to foreign air carriers from the scope of the policy and from the applicability of the expedited hearing procedures in 14 CFR Part 302, subpart F. They argue that § 47129 by its terms precludes us from adopting policies and procedures to determine the reasonableness of fees other than those fees charged to air carriers that are not otherwise excluded from § 47129 by its terms. They further argue that the methods used to establish fees to non-carrier aeronautical users do not readily lend themselves to application of the policy.

The Department does not propose to limit the applicability of the policy to fees imposed on U.S. and foreign air carriers. However, we propose to modify the policy statement to clarify that in situations not covered by § 47129, the policy would be applied by the FAA in its role of administrator of the AIP program in carrying out the agency's obligation to satisfy itself that an applicant for grants is in compliance with its assurances, not in the role of a forum for adjudicating a dispute between private parties. The Department also intends to apply the procedures mandated by § 47129, including the procedures governing refunds, to foreign air carriers in the same way we apply it to U.S. air carriers.

As noted above, the AAIA provides authority for establishing a policy that applies to all airport fees imposed on aeronautical users, including fees imposed on foreign air carriers and noncarrier aeronautical users. In addition, many bilateral aviation agreements include a commitment by the United States that airport fees charged to foreign airlines will be reasonable.

The Department recently considered the applicability of § 47129 to foreign air carriers in the decision on the reasonableness of LAX landing fees. The Department concluded that § 47129 allows foreign airlines to obtain retrospective relief and to file complaints. The Department pointed out that the United States' obligations to give nondiscriminatory treatment to foreign carriers generally precluded us from denying foreign air carriers a remedy available to U.S. carriers absent a bar to granting foreign air carriers that remedy. Order 95–6–36 at 53–56. For the reasons stated in its consideration of the issue in the LAX case, the Department will continue to consider complaints filed by foreign air carriers under the terms of § 47129.

8. Limits on Aeronautical Surplus

The Department proposes to modify the policy to eliminate the total HCA cap on aeronautical revenue and to provide that nonairfield fees may be established by any reasonable means. In providing this flexibility, the Department is in no respect waiving the requirements in statute, AIP grant assurances and, where applicable, international aviation agreements. The use of negotiated rates or rates based on an objective determination of fair market value creates the opportunity for the generation of surplus aeronautical revenues in any given year. The Department proposes to rely generally on market discipline to prevent the generation of aeronautical revenues that, over time, exceed aeronautical costs. Based on this reliance, we are not proposing an alternative cap on fees imposed for aeronautical services and facilities other than the airfield. However, to address the remote chance that the market mechanism may break down, we propose to add a provision on revenue generation specifying that the accumulation of surpluses attributable to aeronautical revenue may warrant an inquiry into the reasonableness of the aeronautical fees (proposed Para. 4.2.1).

Public Meetings

In order to facilitate the submission of public and industry comment, and to ensure that agency staff has the best opportunity to understand the positions of commenters and the scope of industry practice on this complex subject, the Department will hold at least two informal public meetings on the proposed policy. The meetings will be structured to permit informal discussion among the various interested parties rather than simply delivery of prepared comments for the record. Notice of the time, date, and location of the meetings will be published separately in the **Federal Register**.

Proposed Policy

Accordingly, the OST and the FAA propose to revise the Policy Regarding Airport Rates and Charges as follows:

Policy Regarding the Establishment of Airport Rates and Charges

Introduction

It is the fundamental position of the Department that the issue of rates and charges is best addressed at the local level by agreement between users and airports. By providing guidance on standards applicable to airport fees imposed for aeronautical use of the airport, the Department intends to facilitate direct negotiation between the proprietor and aeronautical users and to minimize the need to seek direct Federal intervention to resolve differences over airport fees.

Applicability of the Policy

A. Scope of Policy

Under the terms of grant agreements administered by the FAA for airport improvement, all aeronautical users are entitled to airport access on fair and reasonable terms without unjust discrimination. Therefore, the Department considers that the principles and guidance set forth in this policy statement apply to all aeronautical uses of the airport. The Department recognizes, however, that airport proprietors may use different mechanisms and methodologies to establish fees for different facilities, *e.g.*, for the airfield and terminal area, and for different aeronautical users, *e.g.*, air carriers and fixed-base operators. Various elements of the policy reflect these differences. In addition, the Department will take these differences into account if we are called upon to resolve a dispute over aeronautical fees or otherwise consider whether an airport sponsor is in compliance with its obligation to provide access on fair and reasonable terms without unjust discrimination.

B. Aeronautical Use and Users

The Department considers the aeronautical use of an airport to be any activity that involves, makes possible, is required for the safety of the operations of, or is otherwise directly related to, the operation of aircraft. Aeronautical use includes services provided by air carriers related directly and substantially to the movement of passengers, baggage, mail and cargo on the airport. Persons, whether individuals or businesses, engaged in

aeronautical uses involving the operation of aircraft, or providing flight support directly related to the operation of aircraft, are considered to be aeronautical users.

Conversely, the Department considers that the operation by air carriers or foreign air carriers of facilities such as a reservations center, headquarters office, or flight kitchen on an airport does not constitute an aeronautical activity subject to the principles and guidance contained in this policy statement with respect to reasonableness and unjust discrimination. Such facilities need not be located on an airport. A carrier—s decision to locate such facilities is based on the negotiation of a lease or sale of property. Accordingly, the Department relies on the normal forces of competition for commercial or industrial property to assure that fees for such property are not excessive.

C. Applicability of Section 113 of the FAA Authorization Act of 1994

Section 113 of the Federal Aviation Authorization Act of 1994 (''Authorization Act''), 49 U.S.C. § 47129, directs the Secretary of Transportation to issue a determination on the reasonableness of certain fees imposed on air carriers in response to carrier complaints or a request for determination by an airport proprietor. Section 47129 further directs the Secretary to publish final regulations, policy statements, or guidelines establishing procedures for deciding cases under § 47129 and the standards to be used by the Secretary in determining whether a fee is reasonable. Section 47129 also provides for the issuance of credits or refunds in the event that the Secretary determines a fee is unreasonable after a complaint is filed. Section 47129(e) excludes from the applicability of § 47129 a fee imposed pursuant to a written agreement with air carriers, a fee imposed pursuant to a financing agreement or covenant entered into before the date of enactment of the statute (August 23, 1994), and an existing fee not in dispute on August 23, 1994. Section 47129(f) further provides that § 47129 shall not adversely affect the rights of any party under existing air carrier/airport agreements or the ability of an airport to meet its obligations under a financing agreement or covenant that is in effect on August 23, 1994.

The Department does not interpret § 47129 to repeal or narrow the scope of the basic requirement that fees imposed on aeronautical users be reasonable and not unjustly discriminatory or to narrow the obligation on the Secretary to receive satisfactory assurances that, *inter alia,* airport sponsors will provide access on reasonable terms before approving AIP grants. Moreover, the Department does not interpret sections 47129 (e) and (f) to preclude the Department from adopting policy guidance to carry out the Department's statutory obligation to assure that aeronautical fees are being imposed at AIP-funded airports in a manner that is consistent with the obligation to provide airport access on reasonable terms. Likewise, in the case of airports receiving international service, these provisions do not preclude us from carrying out any international obligations for assuring that airport fees charged to foreign airlines are reasonable.

Therefore, the Department will apply the policy guidance in all cases in which we are called upon to determine if an airport sponsor is carrying out its obligation to make the airport available on reasonable terms, including instances covered in § 47129 (e) and (f).

However, as the statute provides, a dispute over matters described by § 47129 (e) and (f) will not be processed under the procedures mandated by § 47129. Rather those disputes will be processed under procedures applicable to airport compliance matters in general. In addition, the Department will take into account the existence of an agreement between air carrier and airport operator, if one exists, in making a determination.

D. Components of Airfield

The Department considers the airfield assets to consist of runways, taxiways, ramps or aprons not leased on an exclusive use basis and land associated with these facilities. The Department also considers the airfield to include land acquired for the purpose of assuring land-use compatibility with the airfield, if the land is included in the rate base associated with the airfield under the provisions of this policy.

Principles Applicable to Airport Rates and Charges

1. In general, the Department relies upon airport proprietors, aeronautical users, and the market and institutional arrangements within which they operate, to ensure compliance with applicable legal requirements. Direct Federal intervention will be available, however, where needed.

2. Rates, fees, rentals, landing fees, and other service charges (''fees'') imposed on aeronautical users for aeronautical use of airport facilities (''aeronautical fees'') must be fair and reasonable.

3. Aeronautical fees may not unjustly discriminate against aeronautical users or user groups.

4. Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible.

5. In accordance with relevant Federal statutory provisions governing the use of airport revenue, airport proprietors may expend revenue generated by the airport only for statutorily allowable purposes.

Local Negotiation and Resolution

1. In general, the Department relies upon airport proprietors, aeronautical users, and the market and institutional arrangements within which they operate, to ensure compliance with applicable legal requirements. Direct Federal intervention will be available, however, where needed.

1.1 The Department encourages direct resolution of differences at the local level between aeronautical users and the airport proprietor. Such resolution is best achieved through adequate and timely consultation between the airport proprietor and the aeronautical users. Airport proprietors should engage in adequate and timely consultation with aeronautical users about airport fees.

1.1.1 Airport proprietors should consult with aeronautical users well in advance, if practical, of introducing significant changes in charging systems and procedures or in the level of charges. The proprietor should provide adequate information to permit aeronautical users to evaluate the airport proprietor's justification for the change and to assess the reasonableness of the proposal. For consultations to be effective, airport proprietors should give due regard to the views of aeronautical users and to the effect upon them of changes in fees. Likewise, aeronautical users should give due regard to the views of the airport proprietor and the financial needs of the airport.

1.1.2 To further the goal of effective consultation, Appendix 1 of this policy statement contains a description of information that the Department considers would be useful to the carriers and other aeronautical users to permit meaningful consultation and evaluation of a proposal to modify fees.

1.1.3 Airport proprietors should consider the public interest in establishing airport fees, and aeronautical users should consider the public interest in consulting with airports on setting such fees.

1.1.4 Airport proprietors and aeronautical users should consult and make a good-faith effort to reach agreement. Absent agreement, airport proprietors are free to act in accordance with their proposals, subject to review by the Secretary or the Administrator on complaint by the user or, in the case of fees subject to 49 U.S.C. 47129, upon request by the airport operator, or, in unusual circumstances, on the Department's initiative.

1.1.5 To facilitate local resolution and reduce the need for direct Federal intervention to resolve differences over aeronautical fees, the Department encourages airport proprietors and aeronautical users to include alternative dispute resolution procedures in their lease and use agreements.

1.1.6 Any newly established fee or fee increase that is the subject of a complaint under 49 U.S.C. 47129 that is not dismissed by the Secretary must be paid to the airport proprietor under protest by the complainant. Unless the airport proprietor and complainant agree otherwise, the airport proprietor will obtain a letter of credit, or surety bond, or other suitable credit instrument in accordance with the provisions of 49 U.S.C. 47129(d). Pending issuance of a final order determining reasonableness, an airport proprietor may not deny a complainant currently providing air service at the airport reasonable access to airport facilities or services, or otherwise interfere with that complainant's prices, routes, or services, as a means of enforcing the fee, if the complainant has complied with the requirements for payment under protest.

1.2 Where airport proprietors and aeronautical users have been unable, despite all reasonable efforts, to resolve disputes between them, the Department will act to resolve the issues raised in the dispute.

1.2.1 In the case of a fee imposed on one or more air carriers or foreign air carriers, the Department will issue a determination on the reasonableness of the fee upon the filing of a written request for a determination by the airport proprietor or, if the Department determines that a significant dispute exists, upon the filing of a complaint by one or more air carriers or foreign air carriers, in accordance with 49 U.S.C. § 47129 and implementing regulations. Pursuant to the provisions of 49 U.S.C. § 47129, the Department may only determine whether a fee is reasonable or unreasonable, and may not set the level of the fee.

1.2.2 The Department will first offer its good offices to help parties reach a mutually satisfactory outcome in a timely manner. Prompt resolution of these disputes is always desirable since extensive delay can lead to uncertainty for the public and a hardening of the parties' positions. Air carriers and foreign air carriers may request the assistance of the Department in advance of or in lieu of the formal complaint procedure described in 1.2.1.; however, the 60-day period for filing a complaint under § 47129 shall not be extended or tolled by such a request.

1.2.3 In the case of fees imposed on other aeronautical users, where negotiations between the parties are unsuccessful and a complaint is filed alleging that airport fees violate an airport proprietor's federal grant obligations, the Department will, where warranted, exercise the agency's broad statutory authority to review the legality of those fees and to issue such determinations and take such actions as are appropriate based on that review.

1.3 Airport proprietors must retain the ability to respond to local conditions with flexibility and innovation. An airport proprietor is encouraged to achieve consensus and agreement with its airline tenants before implementing a practice that would represent a major departure from this guidance. However, the requirements of any law, including the requirements for the use of airport revenue, may not be waived, even by agreement with the aeronautical users.

Fair and Reasonable Fees

2. Rates, fees, rentals, landing fees, and other service charges (''fees'') imposed on aeronautical users for the aeronautical use of the airport (''aeronautical fees'') must be fair and reasonable.

2.1 Federal law does not require a single approach to airport financing. Rates may be set according to a ''residual'' or ''compensatory'' rate-setting methodology, or any combination of the two, or according to a new rate-setting methodology, as long as the methodology used is applied consistently to similarly situated aeronautical users and as otherwise required by this policy. Airport proprietors may set rates for aeronautical use of airport facilities by ordinance, statute or resolution, regulation, or agreement.

2.1.1 Aeronautical users may receive a cross-credit of nonaeronautical revenues only if the airport proprietor agrees. Agreements providing for such cross-crediting are commonly referred to as ''residual agreements'' and generally provide a sharing of nonaeronautical revenues with aeronautical users. The aeronautical users may in turn agree to assume part or all of the liability for non-aeronautical costs, or an airport proprietor may cross-credit nonaeronautical revenues to aeronautical users even in the absence of such an agreement, but an airport proprietor may not require aeronautical users to cover losses generated by nonaeronautical facilities except by agreement.

2.1.2 In other situations, an airport proprietor assumes all liability for airport costs and retains all airport profits for its own use in accordance with Federal requirements. This approach to airport financing is generally referred to as the compensatory approach.

2.1.3 Airports frequently adopt charging systems that employ elements of both approaches.

2.2 Revenues from fees imposed for use of the airfield (airfield revenues) may not exceed the costs to the airport proprietor of providing airfield services and airfield assets currently in aeronautical use (airfield costs) unless otherwise agreed to by the affected aeronautical users.

2.3 The ''rate base'' is the total of all aeronautical costs that may be recovered from aeronautical users through fees charged for providing aeronautical services and facilities (aeronautical fees). Airport proprietors must employ a reasonable, consistent, and ''transparent'' (i.e., clear and fully justified) method of establishing the rate base and adjusting the rate base on a timely and predictable schedule.

2.4 Except as provided in paragraph 2.6 below or by agreement with aeronautical users, costs that may be included in the rate base (allowable costs) are limited to all operating and maintenance expenses directly and indirectly associated with the provision of aeronautical facilities and services (including environmental costs, as set forth below); all capital costs associated with the provision of aeronautical facilities and services currently in use, as set forth below; and current costs of planning future aeronautical facilities and services. In addition, a private, equity owner of an airport can include a reasonable return on investment.

2.4.1 The airport proprietor may include in the aeronautical rate base, at a reasonable rate, imputed interest on funds used to finance capital investments for aeronautical use, except to the extent that the funds are generated by fees charged for the use of airfield assets and airfield services. However, the airport proprietor may not include in the rate base imputed interest on funds obtained by debt financing if the debt-service costs of those funds are also included in the rate base.

2.4.2 Airport proprietors may include reasonable environmental costs in the rate base to the extent that the airport proprietor incurs a corresponding actual expense. All revenues received based on the inclusion of these costs in the rate base are subject to Federal requirements on the use of airport revenue. Reasonable environmental costs include, but are not necessarily limited to, the following:

(a) the costs of investigating and remediating environmental contamination caused by aeronautical operations at the airport at least to the extent that such investigation or remediation is required by or consistent with local, state or federal environmental law, and to the extent such requirements are applied to other similarly situated enterprises;

(b) the cost of mitigating the environmental impact of an airport development project (if the development project is one for which costs may be included in the aeronautical users' rate base), at least to the extent that these costs are incurred in order to secure necessary approvals for such projects, including but not limited to approvals under the National Environmental Policy Act and similar state statutes;

(c) the costs of aircraft noise abatement and mitigation measures, both on and off the airport, including but not limited to land acquisition and acoustical insulation expenses, to the extent that such measures are undertaken as part of a comprehensive and publicly-disclosed airport noise compatibility program; and

(d) the costs of insuring against future liability for environmental contamination caused by current aeronautical activities. Under this provision, the costs of self-insurance may be included in the rate base only to the extent that they are incurred pursuant to a self-insurance program that conforms to applicable standards for self-insurance practices.

2.4.3 Airport proprietors are encouraged to establish fees with due regard for economy and efficiency.

2.4.4 The airport proprietor may include in the rate base amounts needed to fund debt service and other reserves and to meet cash flow requirements as specified in financing agreements or covenants (for facilities in use), including but not limited to debt-service coverage; to fund cash reserves to protect against the risks of cash-flow fluctuations associated with normal airport operations; and to fund reasonable cash reserves to protect against other contingencies.

2.4.5 The airport proprietor may include in the rate base capital costs in accordance with the following guidance, which is based on the principle of cost causation:

(a) Costs of facilities directly used by the aeronautical users may be fully included in the rate base, in a manner consistent with this policy. For example, the capital cost of a runway may be included in the rate base used to establish landing fees.

(b) Costs of airport facilities used for both aeronautical and nonaeronautical uses (shared costs) may be included in a particular aeronautical rate base if the facility in question supports the aeronautical activity reflected in that rate base. The portion of shared costs allocated to aeronautical users should not exceed an amount that reflects the aeronautical purpose and proportionate aeronautical use of the facility in relation to nonaeronautical use of the facility, unless the affected aeronautical users agree to a different allocation. Aeronautical users may not be allocated all costs of facilities that are used by both aeronautical and nonaeronautical users unless they agree to that allocation.

2.5 Airport proprietors must comply with the following practices in establishing the rate base, provided, however, that one or more aeronautical users may agree to a rate base that deviates from these practices in the establishment of those users' fees.

2.5.1 In determining the total costs that may be recovered from fees for the use of airfield assets, public use roadways, and associated land in the rate base, the airport proprietor must value them according to their historic cost to the original airport proprietor. Subsequent airport proprietors generally shall acquire the cost basis of such assets at the original airport proprietor's historic cost, adjusted for subsequent improvements.

(a) Where the land associated with airfield facilities and public use roadways was acquired with debt-financing, the airport proprietor may include such land in the rate base by charging all debt service expenditures incurred by the airport proprietor, including principal, interest and debt service coverage. If such land was acquired with internally generated funds or donated by the airport proprietor the airport proprietor may include the cost of the land by amortization. Upon retirement of the debt or completion of the amortization, the land may no longer be included in the rate base.

(b) The airport proprietor may use a reasonable and not unjustly discriminatory methodology to allocate the total airfield costs among individual segments of the airfield to enhance the efficient use of the airfield, even if that methodology results in fees charged for a particular segment that exceed that segment's pro rata share of costs based on HCA valuation.

2.5.2 Where comparable assets, e.g., two runways or two terminals, were built at different times and have different costs, the airport proprietor may, at its option, combine the cost basis of the comparable assets to develop a single cost basis applicable to all such facilities.

2.5.3 The costs of facilities not yet built and operating may not be included in the rate base. However, the debt-service and other carrying costs incurred by the airport proprietor during construction may be capitalized and amortized once the facility is put in service. The airport proprietor may include in the rate base the cost of land that facilitates the current operations of the airport.

2.5.4 The rate base of an airport may include costs associated with another airport currently in use only if: (1) The proprietor of the first airport is also the proprietor of the second airport; (2) the second airport is currently in use; and (3) the costs of the second airport to be included in the first airport's rate base are reasonably related to the aviation benefits that the second airport provides or is expected to provide to the aeronautical users of the first airport.

(a) Element no. 3 above will be presumed to be satisfied if the second airport is designated as a reliever airport for the first airport in the FAA's National Plan of Integrated Airport Systems (NPIAS).

(b) If an airport proprietor closes an operating airport as part of an approved plan for the construction and opening of a new airport, reasonable costs of disposition of the closed airport facility may be included in the rate base of the new airport, to the extent that such costs exceed the proceeds from the disposition.

2.6 For other facilities and land not covered by Paragraph 2.5.1, the airport proprietor may use any reasonable methodology to determine fees, so long as the methodology is justified and applied on a consistent basis to comparable facilities, subject to the provisions of paragraph 4.2.1 below.

2.6.1 Reasonable methodologies may include, but are not limited to, historic cost valuation, direct negotiation with prospective aeronautical users, or objective determinations of fair market value.

2.7 At all times, airport proprietors must comply with the following practices:

2.7.1 Indirect costs may not be included in the rate base unless they are based on a reasonable, transparent cost allocation formula calculated consistently for other units or cost centers within the control of the proprietor.

2.7.2 The costs of airport development or planning projects paid for with federal government grants and contributions and passenger facility charges (PFCs) may not be included in the rate base.

(a) In the case of a PFC-funded project for terminal development, for gates and related areas, or for a facility that is occupied by one or more carriers on an exclusive or preferential use basis, the fees paid to use those facilities shall be no less than the fees charged for similar facilities that were not financed with PFC revenue.

Prohibition on Unjust Discrimination

3. Aeronautical fees may not unjustly discriminate against aeronautical users or user groups.

3.1 Unless aeronautical users agree, aeronautical fees imposed on any aeronautical user or group of aeronautical users may not exceed the costs allocated to that user or user group under a cost allocation methodology adopted by the airport proprietor that is consistent with this guidance.

3.1.1 The prohibition on unjust discrimination does not prevent an airport proprietor from making reasonable distinctions among aeronautical users (such as signatory and non-signatory carriers) and assessing higher fees on certain categories of aeronautical users based on those distinctions (such as higher fees for non-signatory carriers, as compared to signatory carriers).

3.2 A properly structured peak pricing system that allocates limited resources using price during periods of congestion will not be considered to be unjustly discriminatory. An airport proprietor may, consistent with the policies expressed in this policy statement, establish fees that enhance the efficient utilization of the airport.

3.3 Relevant provisions of the Convention on International Civil Aviation (Chicago Convention) and many bilateral aviation agreements specify, inter alia, that charges imposed on foreign airlines must not be unjustly discriminatory, must not be higher than those imposed on domestic airlines engaged in similar international air services and must be equitably apportioned among categories of users. Charges to foreign air carriers for aeronautical use that are inconsistent with these principles will be considered unjustly discriminatory or unfair and unreasonable.

3.4 Allowable costs—costs properly included in the rate base—must be allocated to aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology. The methodology must be applied consistently and cost differences must be determined quantitatively, when practical.

3.4.1 Common costs (costs not directly attributable to a specific user group or cost center) must be allocated according to a reasonable, transparent and not unjustly discriminatory cost allocation formula that is applied consistently, and does not require any air carrier, foreign air carrier or other aeronautical user group to pay costs properly allocable to other users.

Requirement to be Financially Self-Sustaining

4. Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible.

4.1 If market conditions or demand for air service do not permit the airport to be financially self-sustaining, the airport proprietor should establish long-term goals and targets to make the airport as financially self-sustaining as possible.

4.1.1 Airport proprietors are encouraged, when entering into new or revised agreements or otherwise establishing rates, charges, and fees, to undertake reasonable efforts to make their particular airports as self sustaining as possible in the circumstances existing at such airports.

(a) Absent agreement with aeronautical users, the obligation to make the airport as self-sustaining as possible does not permit the airport proprietor to establish fees for the use of the airfield that exceed the airport proprietor's airfield costs.

(b) For those facilities for which this policy permits the use of fair market value, the Department does not construe the obligation on self-sustainability to compel the use of fair market value to establish fees.

4.1.2 At some airports, market conditions may not permit an airport proprietor to establish fees that are sufficiently high to recover aeronautical costs and sufficiently low to allow commercial aeronautical services to operate at a profit. In such circumstances, an airport proprietor's decision to charge rates that are below those needed to achieve self-sustainability in order to assure that services are provided to the public is not inherently inconsistent with the obligation to make the airport as self-sustaining as possible in the circumstances.

4.2 In establishing new fees, and generating revenues from all sources, airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenues may be spent under 49 U.S.C. 47107(b)(1), including reasonable reserves and other funds to facilitate financing and to cover contingencies. While fees charged to nonaeronautical users may exceed the costs of service to those users, the surplus funds accumulated from those fees must be used in accordance with § 47107(b).

4.2.1 The Department assumes that the limitation on the use of airport revenue and effective market discipline for aeronautical services and facilities other than the airfield will be effective in holding aeronautical revenues, over time, to the airport proprietor's costs of providing aeronautical services and facilities, including reasonable capital costs. However, the progressive accumulation of substantial amounts of surplus aeronautical revenue may warrant an FAA inquiry into whether aeronautical fees are consistent with the airport proprietor's obligations to make the airport available on fair and reasonable terms.

Requirements Governing Revenue Application and Use

5. In accordance with relevant Federal statutory provisions governing the use of airport revenue, airport proprietors may expend revenue generated by the airport only for statutorily allowable purposes.

5.1 Additional information on the statutorily allowed uses of airport revenue is contained in separate guidance published by the FAA pursuant to § 112 of the FAA Authorization Act of 1994, which is codified at 49 U.S.C. § 47107(l).

5.2. The progressive accumulation of substantial amounts of airport revenues may warrant an FAA inquiry into the airport proprietor's application of revenues to the local airport system.

Issued in Washington, DC, on August 21, 1995.

Federico Peña,

Secretary of Transportation.

David R. Hinson,

Administrator, Federal Aviation Administration.

Appendix 1—Information for Aeronautical User Charges Consultations

The Department of Transportation ordinarily expects the following information to be available to aeronautical users in connection with consultations over changes in airport rates and charges:

1. HISTORIC FINANCIAL INFORMATION covering two fiscal years prior to the current year including, at minimum, a profit and loss statement, balance sheet and cash flow statement for the airport implementing the charges.

2. JUSTIFICATION. Economic, financial and/or legal justification for changes in the charging methodology or in the level of aeronautical rates and charges at the airport. Airports should provide information on the aeronautical costs they are including in the rate base.

3. TRAFFIC INFORMATION. Annual numbers of terminal passengers and aircraft movements for each of the two preceding years.

4. PLANNING AND FORECASTING INFORMATION

(a) To the extent applicable to current or proposed fees, the long-term airport strategy setting out long-term financial and traffic forecasts, major capital projects and capital expenditure, and particular areas requiring strategic action. This material should include any material provided for public or government reviews of major airport developments, including analyses of demand and capacity and expenditure estimates.

(b) Accurate, complete information specific to the airport for the current and the forecast year, including the current and proposed budgets, forecasts of airport charges revenue, the projected number of landings and passengers, expected operating and capital expenditures, debt service payments, contributions to restricted funds, or other required accounts or reserves.

(c) To the extent the airport uses a residual or hybrid charging methodology, a description of key factors expected to affect commercial or other nonaeronautical revenues and operating costs in the current and following years.

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